SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 363

WILLIAM C. BRICKEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1970. A petition for rehearing was denied on May 25, 1970. MR. JUSTICE BLACKMUN extended the time for filing a petition for a writ of certiorari to July 6, 1970, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

400-477—70

QUESTIONS PRESENTED

1. Whether the grand jury was properly selected.

2. Whether evidence of use of the mails was sufficient to sustain petitioner's conviction under the mail fraud statute, 18 U.S.C. 1341.

3. Whether the trial court properly permitted a witness to take the stand when it had prior knowledge that he might plead the Fifth Amendment privilege against self-incrimination.

4. Whether testimony relating to petitioner's personal expenditures was properly admitted.

5. Whether the omission of certain charts from the record on appeal constituted a denial of appellate review.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted on two counts of mail fraud in violation of 18 U.S.C. 1341.[1] On March 24, 1969, he was sentenced to four years' imprisonment. The court of appeals affirmed.

The evidence disclosed that, in 1963, petitioner became President and Chairman of the Board of an insurance company in Arkansas, called Republic (Tr. 18). From then until March 13, 1967, when Republic went into receivership, the company was insolvent (Tr. 32; 53–54; 744a. However, the annual financial statements for the years 1963–1965, certified by petitioner and submitted to the State Insurance Department,

[1] Petitioner was originally indicted on 24 counts of mail fraud. However, 22 of these were dismissed prior to trial. *United States* v. *Brickey*, 296 F. Supp. 742.

indicated a surplus of assets over liabilities (Tr. 19–29).[2] To effect this apparent surplus, petitioner caused Republic to purchase and list as assets several items which had nominally large face values but were in fact worthless. Among them were two certificates of deposit issued by banks in Colorado and the Bahamas, which were controlled by Mr. Frank Blosser (Tr. 345, 400, 415, 427–428, 641). At the time the statements were prepared, both banks were insolvent (Tr. 418, 423, 681–682, 690–691).

In January 1965, petitioner purchased a controlling interest in another insurance company, United Benefit (Tr. 537–538). It was purchased with two cashier's checks of the Central National Bank of Chicago, one for $75,000, the other for $35,000 (Tr. 538–539). The $75,000 check was bought with a check for the same amount drawn on the Republic account in the Worthen National Bank of Little Rock, Arkansas. This check was sent from Chicago to Little Rock through the mails and cleared prior to purchase of the cashier's check (Tr. 540, 562, 650–655). The $35,000 check was purchased with a check payable to petitioner and Republic drawn on the account of Leonhart and Company at the Mercantile Safe Deposit and Trust Company of Baltimore (Tr. 540–541). This was a loan to petitioner secured by a $35,000 check drawn on the Republic account with the Worthen Bank and his personal note (Tr. 547–548). The Republic check was

[2] The annual statement for 1966 was not submitted since receivership proceedings were instituted before it was due to be filed (Tr. 15). A working copy of this statement, admitted at trial, revealed similar overstatements (Tr. 16, 41).

deposited on February 1, 1965 in the Mercantile Trust Company (Tr. 548–550), and sent through the mails to the Worthen Bank where it eventually cleared (Tr. 550–555; 562; 650–655).

Petitioner also used Republic funds, directly or indirectly through a wholly-owned holding company, General Leasing Corporation (Tr. 152–154, 523–525), to pay for reinsurance of United Benefit (Tr. 519, 523–525) and to buy jewelry (Tr. 614–621), a swimming pool (Tr. 633–634) and other personal items. As evidence regarding personal expenditures was introduced, the Court admonished the jury to consider it only insofar as it revealed petitioner's scheme to draw funds from Republic for his own use (Tr. 622).

ARGUMENT

1. Petitioner's motion to dismiss the indictment on the ground that the grand jury was improperly drawn was correctly denied prior to trial.[3] The grand jury list was selected using the key man system;[4] questionnaires had been sent to representatives of the 42 counties comprising the Eastern District of Arkansas to obtain the names of qualified persons (R. 20). The guidelines recommended by the Judicial Conference of the United States were used in making the final selection (R. 25).

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[3] We are lodging a copy of the transcript of the hearing on the motion with the Clerk of this Court. "R" refers to this transcript.

[4] Petitioner's suggestion that the key man system is unconstitutional per se is without merit. See *United States* v. *Tropiano*, 418 F. 2d 1069 (C.A. 2), *Mobley* v. *United States*, 379 F. 2d 768 (C.A. 5).

There is no evidence of systematic exclusion or limitation of an identifiable group from the jury list. *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5), and *Henslee* v. *Stewart*, 311 F. 2d 691 (C.A. 8), certiorari denied, 373 U.S. 902, upon which petitioner relies, are therefore inapposite. Nor is there any indication that improper standards were used in the final selection. Absent such evidence, petitioner fails to overcome the presumption that the list represented a fair cross-section of the community. *Swain* v. *Alabama*, 380 U.S. 202; *Hoyt* v. *Florida*, 368 U.S. 57; *Sanders* v. *United States*, 415 F. 2d 621 (C.A. 5).

2. The fact that checks used by petitioner in his purchase of controlling stock in United Benefit were sent through the mail in order to be cleared for collection was sufficient to prove use of the mails under the mail fraud statute.

Count I of the indictment alleged that petitioner issued a $75,000 check drawn on the Republic account at the Worthen Bank in Arkansas in order to purchase stock in United Benefit as part of his plan to deplete Republic's assets. Petitioner's attorney testified that, to obtain a cashier's check from the Central Bank in Chicago for the purchase, he submitted the Republic check for collection. Only after the check had cleared was the attorney able to get the cashier's check. An officer of the Arkansas bank testified that the check could only have arrived for clearing by use of the mails (Tr. 650).

Count II dealt with a $35,000 check used in the transaction. In order to obtain these funds, petitioner

procured a $35,000 loan from Leonhart and Company of Baltimore, Maryland. In exchange for this loan, petitioner gave Leonhart a $35,000 check drawn on the Republic account in Arkansas, secured by petitioner's personal note. The Republic check was later deposited in a Baltimore bank, and was mailed to Arkansas for clearing. When the check cleared, petitioner's liability on the note was extinguished.

In both instances the clearing process, through use of the mails, was necessary to complete petitioner's fraudulent scheme. *Pereira* v. *United States*, 347 U.S. 1.

3. The trial judge's handling of witness Blosser, who asserted his Fifth Amendment privilege against self-incrimination, was not prejudicial error. Blosser was called in connection with two certificates of deposit having a face value of $100,000 each which were listed by petitioner in Republic's financial statements. Blosser was president of the issuing banks. Before the witness could be sworn, counsel for petitioner informed the court that he intended to plead his Fifth Amendment privilege and requested an examination in chambers, but the court permitted the witness to take the stand immediately. After three questions, the witness was asked his relationship with one of the banks. He refused to answer, claiming the privilege (Tr. 369). The trial judge then retired to chambers where he determined the claim to be well-founded. Upon returning to the courtroom, the judge

admonished the jury to disregard Blosser entirely and to draw no inference against petitioner from his refusal to testify (Tr. 372–373).

It would have been error if the prosecution made a flagrant and conscious attempt to build its case on inferences drawn from the refusal of the witness to testify or if the refusal to testify added critical weight to the prosecution's case in a form not subject to cross-examination. *Namet* v. *United States*, 373 U.S. 179, 186–187. In this case, however, the questioning ended when Blosser invoked the privilege. The prosecutor made no later reference to the refusal and no effort to connect Blosser's alleged criminal acts with petitioner. The trial judge properly directed the jury not to consider the witness's refusal to testify. The incident was a minor one during the course of a lengthy trial in which 33 witnesses were called. See *United States* v. *Hoffman*, 385 F. 2d 501 (C.A. 7), certiorari denied, 390 U.S. 1031; *United States* v. *Harmon*, 339 F. 2d 354 (C.A. 6), certiorari denied, 380 U.S. 944.

4. Testimony concerning specific personal expenditures by petitioner with Republic money was properly admitted as part of the proof of the extent of fraud. In each instance, a check drawn on the account of Republic or General Leasing was used. Other evidence indicated that Republic funds had been diverted into the General Leasing account.

Petitioner complains of the fact that this evidence was admitted despite petitioner's stipulation that

funds from both companies were used for his own expenses (Tr. 612, 621–623). He contends that the evidence was therefore irrelevant and, even if relevant, so prejudicial that only his stipulation that the funds were for personal use should have been admitted. The judge instructed the jury that the evidence of personal use of the funds was material to show the manner by which petitioner diverted funds from Republic and that the particular use made was of no concern (Tr. 621–623). It was within the court's discretion to permit the government to present its evidence rather than accept petitioner's stipulation. *Scales* v. *United States*, 367 U.S. 203; *United States* v. *Pollack*, 417 F. 2d 240 (C.A. 5), certiorari denied, 397 U.S. 917, rehearing denied, 397 U.S. 1030.

5. Petitioner's appeal was not prejudiced by the fact that illustrative charts which had been employed by a government auditor in explaining the complex financial aspects of petitioner's scheme to defraud Republic were not made part of the appellate record. The responsibility for inclusion of the charts rested with petitioner. The appellate court was not hampered in considering petitioner's contentions in any event. The testimony of the witness made it clear that the charts had been prepared solely from company ledgers, deposit slips and other financial documents in evidence. He described each chart in detail (Tr. 664–745). Since the court of appeals had before it a complete picture of both the nature and the contents

of the charts, it was not necessary to view them physically in order to meet petitioner's claim.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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AUGUST 1970.

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[5] At trial, petitioner did not question the accuracy of the charts. Indeed, he raised only one objection to them, the characterization of a certificate of deposit as "worthless." This objection was sustained (Tr. 708–709). Moreover, the court instructed the jury that the charts carried no probative weight but were being employed merely to illustrate the witness's testimony (Tr. 746–747). The trial judge properly allowed their use. *United States* v. *Pollack*, *supra*; *United States* v. *Goldberg*, 401 F. 2d 644 (C.A. 2), certiorari denied, 393 U.S. 1099; *McDaniel* v. *United States*, 343 F. 2d 785 (C.A. 5), certiorari denied, 382 U.S. 826.

U.S. GOVERNMENT PRINTING OFFICE: 1970